U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 15 2006

LIN 05 222 51651

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence, including amended tax returns. For the reasons discussed below, the evidence submitted on appeal is inconsistent and cannot overcome the director's valid concerns.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 25, 2002. The proffered wage as stated on the Form ETA 750 is $70,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1997, a gross annual income of $2,754,701, a net annual income of $218,264 and 48 employees. In support of the petition, the petitioner submitted (1) a self-serving chart of current assets, assets less depreciation, intangible assets, total assets, accounts payable, common stock and retained earnings for 2002, 2003 and 2004; (2) unaudited financial statements for 2004 and (3) Form 1120 U.S. Corporation Income Tax Returns.

The tax returns reflect the following information for the following years:

	2002	2003
Net income	($33,806)	$124,803
Current Assets	$11,276	$16,043
Current Liabilities	$224,272	$0
Net current assets	($212,996)	$16,043

The unaudited financial statements for 2004 reflect $218,254.66 in net income, $854,133.20 in current assets, $99,111.72 in current liabilities and, thus, $755,021.48 in net current assets.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage in 2002 and, on September 1, 2005, denied the petition.

On appeal, counsel asserts that the amended tax returns reflect the company's success and profitability. Counsel notes that the amended returns show increased sales and payroll from 2002 to 2004. Counsel also discusses the assets of the petitioner's shareholders, asserting that the petitioner is an "'S' Corporation." The petitioner submits amended tax returns for 2002 and 2003, purportedly filed with the Internal Revenue Service, its 2004 tax returns and evidence of the personal assets of the petitioner's shareholders.

First, we will consider the initial evidence submitted. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary any wages at any time.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.

Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary. In 2002, according to the initial tax return, the petitioner shows a net loss of $33,806 and negative net current assets. According to the evidence before the director, therefore, the petitioner had not demonstrated the ability to pay the proffered wage out of its net income or net current assets in 2002.

The petitioner's amended and new tax returns reflect the following:

	2002	2003	2004
Net income	($76,211)	$48,592	$49,628
Current Assets	$516,041	$317,825	$588,061
Current Liabilities	$224,272	$0	$232,305

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Net current assets	$291,769	$317,825	$355,756

The amended tax returns are not stamped as filed with the Internal Revenue Service. Moreover, Part I of Form 1120X, Amended U.S. Corporation Income Tax Return, requires a listing of changes in total income, total deductions and taxable income. In 2002, the petitioner that indicated its taxable income remained the same on the initial return and the amended return (a loss of $76,211). On the original 2002 return, however, the petitioner claimed a taxable income of ($33,806). The petitioner provides no explanation for this discrepancy.

Significantly, the original 2002 return was filed using the "accrual" method, according to Schedule K, line 1. The amended 2002 return, however, uses the "cash" method. The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The petitioner has not explained why switching accounting methods from accrual to cash would result in thousands of dollars of additional current assets but no additional current liabilities.

Moreover, the Internal Revenue Services requires the submission of Form 3115 on behalf of each applicant seeking consent to change an accounting method. The record contains no evidence that the petitioner filed this form, seeking permission to change accounting methods.

The petitioner also provides no explanation for the discrepancy between the information in the unaudited financial statements for 2004 and the 2004 tax return.

The petitioner has presented two vastly different pictures of its current assets, with no documentation to show why the second version is more credible than the first. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

The petitioner has not shown that the amended tax returns are more credible than the original returns. The petitioner has failed to submit credible evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage in 2002.

Finally, counsel's reliance on the assets of the shareholders is not persuasive. First, counsel characterizes the petitioner as a Chapter S corporation. The tax returns, however, were filed as a regular Chapter C corporation in 2002 and 2003.[2] The petitioner did not elect to become a Chapter S corporation until January 1, 2004 and the evidence of shareholders' assets relates to 2004 and 2005. Thus, the evidence of the shareholders' assets is irrelevant to 2002, the year at issue. Regardless, a corporation of any type is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958).

[2] The petitioner also did not indicate on the 2002 or 2003 tax return that it was a personal services corporation.

Counsel cites *Matter of Ohsawa America,* 1988-INA-240 (BALCA 1988), for the proposition that the assets of Chapter S corporations can be used to demonstrate an ability to pay the proffered wage. That case involved continuing support from the shareholder, something not demonstrated in this matter. Regardless, while decisions by the Board of Alien Labor Certification Appeals (BALCA), under the Department of Labor, may be relevant to this office in some cases, counsel provides no regulation or other legal citation suggesting that we are bound by such decisions. Whatever BALCA may have stated in 1988, CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. While federal district court decisions are not binding on this office, it is significant that our reasoning was upheld without reservation in federal court long after the BALCA decision on which counsel relies. *Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The court emphasized that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits the INS [now CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *Id.* As such, we will not consider the assets of the shareholders.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.